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Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TIMOTHY E. RUSSELL,

Petitioner,

v.

LEONARD G. DUNSTON, INDIVIDUALLY AND AS DIRECTOR OF THE NEW YORK STATE DIVISION FOR YOUTH; ROBERT A. WILEY, INDIVIDUALLY AND AS DIRECTOR OF HARLEM VALLEY SECURE CENTER; AND EDWARD V. REGAN, INDIVIDUALLY AND AS COMPTROLLER OF THE NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

I. Did the Court of Appeals err in holding that petitioner's procedural due process rights were not violated by respondents' failure to give petitioner notice that his medical leave was being terminated, when the termination of that leave simultaneously foreclosed petitioner's ability to file a timely application for disability retirement under State law?

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No.

In The

Supreme Court of the United States

October Term, 1989

TIMOTHY E. RUSSELL,

Petitioner,

v.

LEONARD G. DUNSTON, Individually and as Director of the New York State Division for Youth; ROBERT A. WILEY, Individually and as Director of Harlem Valley Secure Center; and EDWARD V. REGAN, Individually and as Comptroller of the New York State Employees' Retirement System,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Timothy E. Russell, respectfully prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this procedural due process action on February 12, 1990.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at __ F.2d __, (2d Cir. 1990). It appears as Appendix A to this petition at A-1-17.

The opinion by the United States District Court for the Southern District of New York granting respondents' motion for summary judgment was decided on June 29, 1989. The decision is reported at __ F. Supp. __ (1989). It appears as Appendix B to this petition at B-1-5.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 12, 1990. This petition for certiorari is filed within 90 days of that date. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, Section 1, provides that:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . .

2. TITLE 42 of the United States Code, Section 1983, provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For

the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. Title 42 of the United States Code, Section 1988, provides, in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same effect...In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This statute is printed verbatim as Appendix C to this petition at C-1.

4. New York State Constitution, Article V, §7, provides that:

> After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

5. New York Civil Service Law §50 provides, in pertinent part:

No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

6. New York Civil Service Law §71 provides, in pertinent part:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease...he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position...

This statute is printed verbatim as Appendix E to this petition at E-1.

7. New York Retirement and Social Security Law §500 provides, in pertinent part:

> (b) Notwithstanding any other provision of this article to the contrary, persons who on or after July first, nineteen hundred seventy-six:
>
> 1. Enter the employment of a public employer which participates for such employees in the New York City employees retirement system...shall be required to become members or shall be eligible or ineligible for membership in such retirement system...

This statute is printed verbatim as Appendix F to this petition at F-1-4.

8. New York Retirement and Social Security Law §517 provides, in pertinent part:

> (a) Members shall contribute three percent of annual wages to the retirement system in which they have membership...
>
> (b) [I]n the event membership in a public retirement system shall terminate, other than as a result of transfer to another public employer, any contributions remaining to the credit of the member shall be refunded as specified by the rules or regulations of the system involved...

This statute is printed verbatim as Appendix G to this petition at G-1-3.

9. New York Retirement and Social Security Law §605 provides in pertinent part:

(a) Application for a disability retirement allowance for a member may be made by:

1. Such member...

(b) At the time of the filing of an application pursuant to this section, the member must:

1. Have at least ten years of total service credit, and

2. The application must be filed within three months from the last date the member was being paid on the payroll or within twelve months of the last date he was being paid on the payroll provided he was on a leave of absence for medical reasons without pay during such twelve month period provided the member was disabled at the time he ceased being paid.

This statute is printed verbatim as Appendix H to this petition at H-1-3.[1]

STATEMENT OF THE CASE

Introduction

This action was brought by the petitioner, Timothy E. Russell, under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§1983 and 1988 (1981). Federal jurisdiction was conferred on the court of original instance by 28 U.S.C. §§1331 and 1343(3) and (4). The primary issue is whether petitioner was deprived, without procedural due process, of a constitutionally protected property interest in his claim of entitlement to disability retirement benefits. Petitioner's contention is that because respondents failed to give him any prior notice that his public employment and medical leave of absence

[1] In 1989 this section was amended, but the amendment is prospective and therefore does not affect petitioner's case.

were being terminated, his opportunity to file a timely claim for disability retirement was irrevocably and improperly foreclosed. To be timely under the applicable provisions of state law, the application had to be filed while the petitioner was still on an approved medical leave.

Facts

In 1981, petitioner was appointed by the New York State Division for Youth as a Youth Division Aide at Harlem Valley Secure Center (hereafter "Center"). This was a "permanent" position. As such, under the New York Retirement and Social Security Law (hereafter "RSSL") §500 (McKinney 1987), petitioner was required to become a member of the New York State Employees Retirement System (hereafter "Retirement System"). App. A at 3. Petitioner joined the Retirement System and became a member of what is commonly referred to as "Tier III" of the System. (*See, RSSL* §500) Under Tier III, three (3) percent of petitioner's gross salary was automatically deducted from his state paycheck and transmitted to the Retirement System. *RSSL* §517; App. B at 2.

In September 1983, petitioner was injured when trying to break up a fight between clients of the Center. Petitioner was hit on the head and neck with a chair. App. A at 3. He was immediately placed on a medical leave of absence from his state employment under New York Civil Service Law §71 (McKinney 1987) (hereafter "*CSL*"). App. A at 5. *CSL* §71 provides a minimum one-year leave of absence and certain reinstatement rights for employees who suffer occupational injury. App. A at 4. Petitioner was continued on medical leave and on the payroll through June 27, 1984. On that date, he went off the payroll but was continued on medical leave without pay. App. A at 5.

By certified letter dated December 18, 1984, petitioner was notified by respondent Robert A. Wiley, Director of the Harlem Valley Secure Center, that his leave of absence had expired and his employment was being terminated, effective December 18, "[i]n accordance with Section 71 of the Civil Service Law..."

App. A at 5, 6; App. B at 2. Petitioner did not receive this letter until some time after December 18, and was given no prior notice that either his employment or leave of absence was to be terminated on December 18. App. A at 5, 6, 11, 13, 14, 16, 17; App. B at 2.

In March 1985, petitioner filed an application for disability retirement under *RSSL* §605. In June 1985, respondent Edward V. Regan, Comptroller of the State of New York and head of the Retirement System, denied this application as untimely, finding that it was not made within the time limits then contained in *RSSL* §605(b)(2).[2] App. A at 6. Under these provisions, the application had to be filed within three months from the date petitioner was last paid on the payroll or within twelve months of the last date he was last paid on the payroll and on a leave of absence for medical reasons. App. A at 6; App. B at 2. Petitioner was advised by the Retirement System that this determination could be the subject of a "hearing and redetermination" if application were made within four months. Pursuant to petitioner's request, a hearing was held in May 1986. The hearing officer upheld respondent Regan's finding of untimeliness. App. B at 2.

The denial of disability retirement benefits, based soley on the finding that petitioner's application was not timely, represents a substantial loss to the petitioner. If he had been found eligible for these benefits, pursuant to *RSSL* §605(d) his yearly retirement allowance would have been approximately $6,400 (Six-Thousand-Four-Hundred). Since petitioner was 26 when he was injured, barring his recovery, he would be eligible to receive this particular benefit for 34 years, until he reaches 60 years of age (*RSSL* §605(d)). This amounts to a potential prospective benefit of over $200,000 (Two-Hundred-Thousand). App. A at 12.

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[2] *RSSL* §605(b)(2) was amended in 1989 to provide that an application will be timely, *inter alia*, if filed within twelve months of receiving notice that the employee's employment has been terminated. This amendment took effect in June 1989, and therefore does not apply to petitioner's case.

SUMMARY OF ARGUMENT

As a full-time State employee, petitioner was required to be a member of the Retirement System. (*RSSL* §500) As a member, he was required to contribute 3% of his wages, by payroll deduction, to the System. (*RSSL* §517) App. B at 2. By virtue of this membership, he had certain retirement rights, including the right to receive disability retirement, assuming he met the substantive statutory criteria for such retirement. (*RSSL* §605) By terminating petitioner's employment and his medical leave of absence without pretermination notice, respondent State officials completely foreclosed petitioner's opportunity to timely apply for disability retirement, because an application for disability retirement, to be timely, had to be made within three months of leaving the payroll or within twelve months of leaving the payroll *and* while the employee is still on a leave of absence for medical reasons. (*RSSL* §605(b)(2)) Since petitioner left the payroll in June 1984, under *RSSL* §605(b)(2), he could have timely filed a disability retirement application through June 1985, so long as he was still on approved medical leave at the time of filing. Thus, the December 18, 1984 letter, which terminated petitioner's employment and medical leave, completely extinguished any opportunity for plaintiff to file a timely application. It is petitioner's contention that his claim of entitlement to disability retirement is a constitutionally protected property interest and that respondents' failure to provide any notice that this interest was being terminated violated the constitutional guarantee of procedural due process.

Litigation History

At the District Court, since there were no disputed issues of material fact, petitioner moved for summary judgment. Respondents cross-moved for summary judgment. The District Court denied petitioner's motion and granted summary judgment to respondents. Appendix B. The sole basis for the District Court's ruling was that the relief sought by the petitioner constituted retrospective relief against the State of New York and was, there-

fore, barred by the Eleventh Amendment. App. B at 5. The District Court did not reach the merits of petitioner's due process claim or the several other defenses raised by respondents. App. B at 3. Petitioner appealed from the grant of summary judgment to respondents, as well as from the denial of his motion for summary judgment.

The Second Circuit Court of Appeals, in a 2-1 decision, reversed the District Court on the Eleventh Amendment issue, but rejected the petitioner's due process claim on the merits. App. A at 3. The court recognized that public employee retirement benefits in New York are constitutionally protected property. App. A at 10. The court decided, however, that there was a valid State reason for not giving petitioner notice. App. A at 11. It interpreted the State statutes in question to require employees who suspect they are permanently disabled to apply for disability retirement as soon as that suspicion arises. App. A at 13. Accordingly, the court found that a New York State employee who is on medical leave under *CSL* §71 is not entitled to notice regarding termination of the leave, even though the termination of the leave also terminates the time period for applying for disability retirement. App. A at 13. Judge Lumbard, in dissent, agreed with petitioner's contention that procedural due process required prior notice of termination of medical leave since, by terminating the leave, the respondents simultaneously foreclosed petitioner's ability to timely apply for disability retirement benefits. App. A at 14.

ARGUMENT

POINT I

THE SECOND CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT PETITIONER'S CLAIM OF ENTITLEMENT TO DISABILITY RETIREMENT BENEFITS WAS CONSTITUTIONALLY PROTECTED PROPERTY, BUT ERRED IN HOLDING THAT PROCEDURAL DUE PROCESS DID NOT REQUIRE SOME KIND OF NOTICE BEFORE THIS INTEREST WAS FORECLOSED BY THE ACTION OF RESPONDENTS.

The Court of Appeals correctly found that petitioner's claim of entitlement to disability retirement benefits was a constitutionally protected property interest. App. A at 10. What constitutes "property" for purposes of constitutional protection is governed by "[e]xisting rules or understandings that stem from an independent source such as state law...rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Under New York's constitutional and statutory scheme, a public employee's claim of entitlement to retirement benefits is constitutionally protected property.

Article V, §7 of the New York State Constitution provides that membership "[i]n any pension or retirement system of the State...shall be a contractual relationship, the benefits of which shall not be impaired." The purpose of Article V, §7 is to "fix the rights of the employee at the time the employee became a member of the system" and to "prohibit [the] diminution or impairment [of such rights] prior to retirement." *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y.2d 1, 9, 176 N.Y.S.2d 984, 989-990 (1958). Accordingly, the federal courts have repeatedly found public employee retirement rights to be entitled to due process protection. *Winston v. City of New York*, 759 F.2d 242, 247-249 (2d Cir. 1985) (ordinary retirement); *Basciano v. Herkimer*, 605 F.2d 605 (2d Cir. 1978), *cert. den.*

442 U.S. 929 (1979); and *Gillott v. City of New York*, 662 F.Supp. 171, 173-174 (S.D.N.Y. 1987) (disability retirement).

Thus, as found by the Court of Appeals, petitioner's claim of entitlement to disability retirement benefits was a constitutionally protected property interest. App. A at 10. The remaining question before the court, therefore, was whether the foreclosure of this interest, by respondents' termination of petitioner's employment and unpaid medical leave, violated the guarantee of procedural due process. The adequacy of the State's hearing procedures was not questioned. Rather, the issue was whether the lack of pretermination notice deprived petitioner of a constitutionally adequate opportunity to present his claim.

In determining this due process issue, the Court of Appeals applied the test established by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Id.*, 424 U.S. at 335.]

The Court of Appeals' majority, applying the first part of this test, correctly held that petitioner's claim of entitlement to disability retirement is a substantial property interest. App. A at 12. As noted, had petitioner timely presented his claim, and had he been able to establish his claim for eligibility on the merits, he stood to receive a potential lifetime benefit of over $200,000 (Two-Hundred-Thousand). (*RSSL* §605(d)) App. A at 12.

The recognition that substantial procedural safeguards should attend the loss of disability retirement benefits is plain common sense. A disability payment by definition exists to provide income to those disabled from earning income. If an employee

is disabled from employment through injury, the need for a disability benefit for the employee and his or her family will in many cases be urgent.

While recognizing how substantial the loss of disability retirement benefits might be, the majority, in applying the second part of the *Mathews* test, held that the statutory scheme created "very little risk" of erroneous disentitlement. App. A at 12. The majority decision holds that a disabled employee who "suspects" that he is permanently disabled should file for retirement. App. A at 13. If not permanently disabled, then the employee can remain on leave under *CSL* §71. App. A at 13. Therefore, according to the majority's analysis, petitioner's loss was his own fault — if he believed himself to be permanently disabled he had ample notice and time to file his application. App. A at 12, 13.

As noted in Judge Lumbard's dissent, this analysis ignores both the law and the facts. There is nothing under New York law to support the conclusion that this statutory scheme was intended to force occupationally injured workers into an early choice about whether to seek retirement as permanently disabled or to remain on leave in the hope of recovering and returning to work. As further noted by the dissent, the majority's reasoning that an employee can and should make an early decision about whether he is permanently disabled is contrary to the realities of this kind of situation. There is simply no factual support for the proposition that an injured worker will know immediately that his or her injury is permanent. Nothing in the statutory scheme required petitioner to forego his leave, and his hope of returning to work, in favor of an application for disability retirement.

Thus, the majority incorrectly applied the second part of the *Mathews* test. The second prong of the test is not concerned with whether an individual could have taken steps to avoid the loss, but whether the procedures themselves create an undue risk of erroneous deprivation and whether additional safeguards would reduce this risk. In this regard, the absence of pre-termination notice not only created a substantial risk of erroneous depriva-

tion, it completely foreclosed the opportunity to file a timely application and eliminated the petitioner's chance for a hearing on the merits. Thus, under the statutory scheme applied to petitioner's situation, prior notice that his medical leave was being terminated was essential to allow petitioner to timely present his retirement claim.

As this Court has noted:

> Ingrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for a mere failure to act. [*Lambert v. California*, 355 U.S. 225, 228 (1957).]

Indeed, no matter how complete the State's hearing procedures may be, such procedures are meaningless without notice sufficient to allow an individual to invoke them. *Greene v. Lindsey*, 456 U.S. 444, 449 (1982). Thus, procedural due process requires some kind of notice prior to the deprivation of a property or liberty interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (termination of tenured public employee); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 799-800 (1983) (tax sale of private property); *Greene*, *supra* (eviction from public housing project); *Memphis Light, Gas and Water Division v. Kraft*, 436 U.S. 1 (1978) (termination of public utility service); and *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (suspension of public school student). These cases establish that some form of notice, designed to insure actual notice, is constitutionally required before the State takes an action which disturbs a protected property interest. *Lambert v. California*, *supra*, at 355 U.S. 228; *Mennonite*, *supra*, at 462 U.S. 800.

In this case, petitioner's claim for disability retirement has never been heard on the merits. The failure of the respondents to provide him with pretermination notice absolutely foreclosed

his opportunity to file a timely application. Such an arbitrary deprivation violates the guarantee of procedural due process. *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 433-434 (1982). Thus, under the *Mathews'* test, the absence of pretermination notice created a substantial risk of erroneous deprivation.

The next question under the second part of the *Mathews'* test is the probable value of additional or substitute procedural safeguards. *Mathews*, *supra*, at 424 U.S. 335. In this case, the value of advance notice is obvious. Had Mr. Russell been given advance notice that his leave was to be terminated, he would have had an opportunity to submit a timely application. This is not to say that petitioner would have prevailed on the merits, but he would at least have had the opportunity to timely apply and to present his claim. This is all that procedural due process requires.

The value of the additional safeguard of pretermination notice is even more important in this case than it would be in the case of loss of employment. The loss of employment can, to a large extent, be remedied through a post-deprivation hearing. *See, Loudermill*, *supra*, at 470 U.S. 545-546. The failure to file a timely retirement application, however, totally and irrevocably destroys that property interest, making post-deprivation review procedures meaningless. *Logan v. Zimmerman Brush Company*, *supra*, at 455 U.S. 434, n. 8.

Also, with respect to the value of added procedural safeguards, this Court has emphasized that the courts must:

> [L]ook to the realities of the case before [them]: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, 'its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.' *North Laramie Land Company v. Hoffman*, 268 U.S. 276, 283, 69 L.Ed. 953, 45 S.Ct. 491 (1925). [*Greene v. Lindsey*, *supra*, at 456 U.S. 451.]

Applying this principle to retirement cases, the Court should consider the fact that many employees are simply unaware of their retirement rights. In this case, as was noted by Judge Lumbard, not only was petitioner unaware of his eligibility for disability retirement, but public officials gave him erroneous advice about those rights. App. A at 15. This is not surprising, for this problem goes far beyond petitioner.

An August 1987 report by the United States General Accounting Office to the Chairman of the Select Committee on Aging, United States House of Representatives (GAO/HRD -87-94BR) studied over 1,000 public and private retirement plans and concluded that between 40 to 75 percent of workers do not understand their retirement eligibility rights. (*Id.*, pp. 1-2) Since retirement rights are such an important property interest, and since there is such widespread misunderstanding about eligibility for those rights, there is substantial value in added procedural safeguards attendant to the final deprivation of a claim of entitlement to retirement benefits.

Thus, as to the second part of the *Mathews'* test, the lack of prior notice of the termination of petitioner's medical leave arbitrarily and irrevocably foreclosed petitioner's opportunity to present a timely claim for disability retirement. This foreclosure could have been avoided by the simple expedient of reasonable advance notice.

The final part of the *Mathews'* inquiry is: "[T]he government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail." *Mathews*, *supra*, at 424 U.S. 335. While administrative inconvenience alone will not excuse a due process violation, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 646-647 (1974), a court must consider this factor in determining what procedures are required.

In applying this part of the test, the majority again referred to the State's interest—an interest not expressed in statute or caselaw — "[I]n discouraging employees who are on medical

leave from prolonging that status to claim permanent disability only when the employing agency terminates the medical leave." App. A at 13. Contrary to this finding, however, there is nothing in either *RSSL* §605(b)(2) or *CSL* §71 to indicate that the State has an interest, expressed or otherwise, in forcing injured workers to make an election earlier than is required by the statutory time limits themselves. Indeed, the traditional rules of statutory construction (*see Sullivan v. Everhart*, 494 U.S.__, 110 S.Ct. 960, 108 L.Ed.2d 72, 80 (1990)) would seem to prohibit a court from reading into New York's statutory scheme an intent which is contrary to the express statutory language.

At the time petitioner was terminated without notice on December 18, 1984, petitioner was lawfully on leave under *CSL* §71 and had the right under *RSSL* §605(b)(2) to file a timely application for disability retirement—so long as he remained on leave— for up to one year after he left the payroll. Nothing in these statutes demonstrates that New York has sought to force employees into making an early decision. Rather, the fact that *RSSL* §605(b)(2) allowed an employee to timely file within one year of leaving the payroll, provided the employee was on a medical leave at the time of filing, demonstrates a legislative intent that there will be employees who will take advantage of this statutory entitlement. Moreover, the 1989 amendment of *RSSL* §605(b)(2), Appendix H, which allows a timely filing within one year after receiving notice that employment has been terminated, also erodes the majority's reasoning that New York has expressed an interest in forcing employees to elect retirement before absolutely necessary under the applicable statutes.

Even if New York had expressed an interest in requiring occupationally injured workers to decide whether to apply for disability retirement before the expiration of the deadlines set forth in the statute, certainly this interest could be achieved without any substantial burden on the State by giving the affected employee notice that his or her leave is about to be terminated. Since the State has created a property interest in disability retirement, the procedures attendant to a deprivation of that interest are a

matter of constitutional guarantee, not legislative grace. *Loudermill, supra*, at 470 U.S. 541. What the majority's decision seems to be saying is that the risk of termination without notice will encourage employees to promptly seek retirement. What conceivable state interest is advanced by foreclosing claims in such an arbitrary and random manner? What conceivable burden is placed on the State by providing prior notice? The proper application of the third part of the *Mathews'* test would have led to a different result.

Under *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), procedural due process requires notice that: (1) conveys the required information, and (2) "...afford[s] a reasonable opportunity for those interested to make their appearance...[citation omitted]" (*Id.* at 339 U.S. 314). It is hard to see how a requirement that an employee be given reasonable advance notice that he is to be terminated would impair any State interest or impose any significant burden on public employers or public employee retirement systems—especially when this slight additional burden is measured against the potential loss to public employees who are denied the opportunity to timely apply for retirement benefits.

First, in most situations a public employer in New York is already required to give employees advance notice of termination. "Tenured" civil servants cannot be discharged from public employment without prior notice, a statement of charges, and an opportunity for a hearing. *CSL* §75; *see also, Loudermill, supra*, at 470 U.S. 546; *Economico v. Village of Pelham*, 50 N.Y.2d 120, 125, 428 N.Y.S.2d 213, 215 (1980). Under the rules of the Department of Civil Service, probationary employees who are dismissed for unsatisfactory service are entitled to written notice at least one week prior to termination. 4 NYCRR §4.5(iii). Even employees who are disqualified from their appointed positions for engaging in deception or fraud to obtain appointment may not be terminated without a written statement of reasons and an opportunity to make an explanation. *CSL* §§50(f),(g) and (h).

Unfortunately, petitioner fell into a rare situation covered by none of the existing State procedures. As a probationary employee, he was not entitled to notice and a hearing under *CSL* §75. Although he was a probationary employee, he was not terminated for failure to satisfactorily complete his probation, but because of occupational disability under *CSL* §71. Thus, he was not entitled to notice under 4 NYCRR §4.5(iii). Finally, since he was not terminated for fraud, petitioner did not get notice under *CSL* §50(4)(h). Petitioner got no notice simply because his unusual situation was covered by none of the existing state procedures.[3] This very fact — that the additional requirement of advance notice will apply to few cases and will, therefore, not unduly burden the government, should have weighed heavily in favor of requiring that such notice be given. *Logan*, *supra*, at 455 U.S. 435.

Furthermore, as a practical matter, even where there is no statute, rule or decision which mandates pre-termination notice, an employer will surely at some point notify an employee that his leave of absence and employment are being terminated. In fact, as noted by Judge Lumbard, post-termination notice, which did petitioner absolutely no good, was given in this case. App. A at 17.

It is apparent that there simply would be no significant additional burden[4] placed on public employers by requiring some reasonable advance notice of termination, particularly when that termination might drastically affect the employee's retirement rights. As this case graphically illustrates, however, the benefit

[3] The gap into which petitioner fell has been closed as a result of the 1989 amendment to *RSSL* §605(b)(2) and a recent amendment to 4 NYCRR §§5.9, 21.8, and 28-1.8. Under these amendments, which are prospective and therefore inapplicable to petitioner's case, occupationally injured civil servants are entitled to 30 days notice of termination of their medical leave, and disability retirement applications are timely if filed within one year of receipt of notice of the termination.

[4] As noted in footnote 3, New York has now voluntarily assumed the burden of giving pre-termination notice in cases under *CSL* §71. 4 NYCRR §21.8.

to the employee of having some advance notice of the employer's plan is that it will give the employee a reasonable opportunity to exercise whatever employment-related rights he may have, including the right to file a timely claim for disability retirement. *Mullane*, *supra*, at 339 U.S. 314.

In the last analysis, what the Court of Appeals' majority held is that petitioner did not need notice because he could have protected himself by filing for disability retirement at any time before his leave was terminated. App. A at 11, 12. By failing to do so, he acted at his own peril.

This reasoning is contrary to this Court's requirement that at a minimum, due process requires some kind of notice before the State deprives a person of property or liberty. *See*, *Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 115, 110 S.Ct. 975 (1990). The Second Circuit's decision had the practical effect, in this case, of eliminating "notice" as a fundamental element of due process. In virtually any procedural due process case, the person claiming that the procedural safeguards were inadequate could have avoided the issue by taking prophylactic measures. For example, a person whose real property is sold at a tax sale could potentially avoid the sale by timely payment of the debt, or by regularly checking the newspapers for notices about tax sales. This, however, does not relieve the State of its obligation to provide notice. This Court has squarely rejected any such approach:

> A party's ability to take steps to safeguard its interests does not relieve the state of its constitutional obligation.
>
> * * *
>
> Notice by mail or other means as certain to insure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. [*Mennonite Board of Missions v. Adams*, 462 U.S. 791, 799-800 (1983).]

In this case, that petitioner could have avoided the foreclosure of his opportunity to timely apply for retirement by filing before his leave was terminated is tautologically true. Unfortunately, this reasoning ignores the fact that the State respondents, by their actions, terminated a substantial property interest "owned" by petitioner. That petitioner by his own actions may have been able to avoid this loss does not relieve the respondents of their constitutional obligations.

To summarize the application of the *Mathews* test to this case: (1) the loss of petitioner's claim of entitlement to disability retirement was substantial; (2) the failure to give pre-termination notice irrevocably foreclosed petitioner's claim of entitlement — something which could have been avoided by the simple expedient of reasonable advance notice; and (3) the additional burden which would be placed on the respondents by giving reasonable advance notice was slight or non-existent.

A WRIT OF CERTIORARI SHOULD BE GRANTED.

Disability retirement income for a permanently disabled public employee is a substantial property interest. Under the statutory scheme which existed when petitioner filed his retirement application, petitioner could only timely file while he was still on unpaid medical leave. Therefore, the respondents' action in terminating that leave simultaneously and irrevocably foreclosed petitioner's legal opportunity to timely present his claim. The simple and straightforward issue in this case is whether these State officials, by taking an action which had such a final impact on so substantial a property interest, were required by due process to provide some form of pre-termination notice to allow the petitioner a legal opportunity to file his retirement claim.

Although the statutory scheme under which this deprivation occurred has been amended, this is of no aid to Mr. Russell or his family, who face the spectre of a lifetime without retirement disability income. This Court has always shown the greatest solicitude for the procedural due process rights of individuals. This Court has consistently required some form of notice before

government officials disturb individual's property or liberty rights.

Finally, a reversal of the Second Circuit's decision would be in accordance with the prior decisions of this Court, and would encourage those who administer retirement plans across the country to be more careful about actions which could arbitrarily deprive workers of important retirement rights. The petitioner respectfully prays that his petition be granted.

Respectfully submitted,

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May 11, 1990

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 552—August Term, 1989

(Argued: December 6, 1989

Decided: February 12, 1990)

Docket No. 89-7800

TIMOTHY E. RUSSELL,

Plaintiff-Appellant,

—v.—

LEONARD G. DUNSTON, Individually and as Director of the New York State Division for Youth, ROBERT A. WILEY, Individually and as Director of Harlem Valley Secure Center, and EDWARD V. REGAN, Individually and as Comptroller of the New York State Employees' Retirement System,

Defendants-Appellees.

Before:

LUMBARD, NEWMAN and WINTER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) granting on Eleventh Amendment grounds defendants' motion for summary judgment. Plaintiff claims that he was denied due process in defendants' rejection of his application for disability retirement benefits. The Eleventh Amendment does not bar the relief sought in the complaint, but plaintiff's due process argument fails as a matter of law.

Affirmed.

Judge Lumbard dissents in a separate opinion.

RICHARD E. CASAGRANDE, Albany, New York, *for Plaintiff-Appellant.*

NANCY MILLER LERNER, Assistant Attorney General (Robert Abrams, Attorney General of the State of New York, Ellen J. Fried, Marilyn T. Trautfield, Assistant Attorneys General, New York, New York, of counsel), *for Defendants-Appellees.*

WINTER, *Circuit Judge*:

This action, brought under 42 U.S.C. § 1983, questions the constitutional adequacy of the notice given to an applicant for disability retirement benefits regarding the appropriate time for filing. Appellant Timothy E.

Russell contends that the failure to provide notice prior to the termination of his medical leave status deprived him of property rights without due process because that termination also marked the end of his application period for disability retirement.

Judge Griesa, without passing on the merits of the due process claim, granted summary judgment for defendants on the ground that the Eleventh Amendment barred the relief sought by Russell. Although we conclude that an order reinstating Russell to medical leave for purposes of his applying for disability retirement is prospective relief permitted by the Eleventh Amendment, we hold that Russell's due process rights were not violated. We therefore affirm.

BACKGROUND

The facts are undisputed. In September 1981 plaintiff Timothy Russell was appointed by the New York State Division for Youth as a Youth Division Aide at the Harlem Valley Secure Center. In June 1982, Russell became a Vocational Instructor at the Center. Because these were "permanent" positions under New York's Retirement and Social Security Law. *See* N.Y. Retire. & Soc. Sec. Law § 500 (McKinney 1987 & Supp. 1990) ("RSSL Section 500"), Russell was required to become a contributory participant in the New York State Employees' Retirement System ("ERS").

On September 21, 1983, Russell was struck on the head by a chair while trying to break up a fight between residents of the Center. The injuries Russell received disabled him. New York's statutory scheme for disabled state workers creates two classifications for state work-

ers disabled by a work-related injury. The first classification is for workers who believe themselves temporarily disabled and wish to preserve certain reinstatement rights to their job. This is governed by New York Civil Service Law, N.Y. Civ. Serv. Law § 71 (McKinney 1983) ("CSL Section 71"), which affords a one-year medical leave of absence as of right and certain reinstatement rights for one year after termination of the disability.[1] The second classification is for workers who believe themselves permanently disabled. This is governed by New York's disability retirement law, N.Y. Retire. & Soc. Sec. Law § 605 (McKinney 1987 & Supp. 1990) ("RSSL Section 605"), which provides that an application for disability retirement must be made (a) within three months of the last day the employee was on the payroll or (b) within twelve months of the last payroll

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1 CSL Section 71 provides in pertinent part:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he was eligible for transfer.

(footnote omitted).

date and while the employee is still on a medical leave of absence without pay.[2]

Russell was placed on a CSL Section 71 medical leave of absence and was on workers' compensation leave until March 21, 1984. On March 12, the Harlem Valley Center informed him that his 120 compensation days would be exhausted as of March 21 and his accruals of sick and personal days would next be applied. After those were exhausted, the letter continued, Russell could apply for a further ten weeks at half-pay. This he did, by letter of March 27. On June 27, 1984, his pay was discontinued, although he remained on medical leave. On November 28, 1984, Russell received a check based on a payroll adjustment. Finally, in a December 18 letter, Russell was notified by defendant Robert A. Wiley,

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2 Prior to a 1989 amendment, RSSL Section 605 provided in pertinent part:

> a. Application for a disability retirement allowance for a member may be made by:
>
> 1. Such member, or
>
> 2. The head of the department in which such member is employed.
>
> b. At the time of the filing of an application pursuant to this section, the member must:
>
> 1. Have at least ten years of total service credit, and
>
> 2. The application must be filed within three months from the last date the member was being paid on the payroll or within twelve months of the last date he was being paid on the payroll provided he was on a leave of absence for medical reasons without pay during such twelve month period provided the member was disabled at the time he ceased being paid.
>
> 3. Provided, however, if the retirement system determines that such member was physically or mentally incapacitated for performance of gainful employment as the natural and proximate result of an accident not caused by his own willful negligence sustained in the performance of his duties in active service while actually a member of the retirement system the requirement that the member should have ten years of credited service shall be inapplicable.

director of the Harlem Valley facility, that his leave of absence was terminated as of that date. The letter stated that "[i]n accordance with Section 71 (attached), within one year of the termination of your disability, you may apply for reinstatement."

In March 1985, Russell filed an application for disability retirement under RSSL Section 605. Defendant Edward Regan ("Comptroller") denied the application as untimely because it had not been made either within three months of Russell's last day on the payroll or within twelve months of the last payroll date and during the pendency of a medical leave of absence. *See* RSSL Section 605(b)(2), *supra* note 2. At Russell's request, a hearing for redetermination was conducted in May 1986, but the hearing officer upheld the Comptroller's finding by a decision dated October 31, 1986. The hearing officer noted that even if the receipt of the November 24 payroll adjustment constituted being on the payroll, Russell's application was still untimely. On December 8, 1986, the Comptroller issued a final determination denying Russell's application for benefits.

On October 30, 1987, Russell brought the present action seeking, inter alia, an injunction requiring defendants to reinstate him to medical leave and to determine his eligibility for retirement benefits on the merits. The gravamen of his claim was that he had a property interest in disability retirement benefits of which he was deprived by the December 18 letter without constitutionally adequate notice.

On cross-motions for summary judgment, the district court ruled for the defendants, dismissing the complaint on the ground that the injunctive relief sought was a retroactive remedy against the state and therefore barred

by the Eleventh Amendment. *Russell v. Dunston*, No. 87 Civ. 7749 (TFG) (S.D.N.Y. June 26, 1989). In so ruling, Judge Griesa concluded that Russell's claim was "inherently one against the State of New York, since [his] problem is with State law and policy, which the defendants merely carried out in their official capacity." *Russell*, slip op. at 7. He also observed that the object of the complaint was "to alter a past determination under this policy rather than change the policy for the future." *Id.* He did not reach the due process issue. Russell appeals.

DISCUSSION

Russell asks that we reverse the district court's ruling that the Eleventh Amendment bars the relief requested and that we grant him summary judgment on his due process claim. We agree as to the Eleventh Amendment issue but believe that he was not deprived of his right to due process.

1. *The Eleventh Amendment*

The Eleventh Amendment to the Constitution bars suits against a state in federal court unless that state has consented to the litigation, *see Papasan v. Allain*, 478 U.S. 265, 276-77 (1986); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984), or Congress has permissibly enacted legislation specifically overriding the state's immunity, *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). An unconsenting state is immune not only from suits for damages but also from declaratory and equitable actions. *See Cory v. White*, 457 U.S. 85, 91 (1982); *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam).

Actions against state officials are also barred by the Amendment where the relief granted would bind the state or where the state is the real party in interest. *See Pennhurst*, 465 U.S. at 101. Excepted, however, from this general proscription are suits against a state officer alleging the violation of federal law in which injunctive relief governs only the officer's future conduct and does not provide a retroactive remedy. *See Edelman v. Jordan*, 415 U.S. 651, 677 (1974); *Dwyer v. Regan*, 777 F.2d 825, 836 (2d Cir. 1985), *modified*, 793 F.2d 457 (2d Cir. 1986).

Russell does not seek monetary relief in his federal action. Rather, he seeks an injunction requiring the defendant state officials to reinstate him to his medical leave status, thus effectively removing the time bar to his application for disability retirement imposed by RSSL Section 605(b)(2). The issue is whether such an injunction is "prospective" relief within the meaning of the exception.

In *Dwyer v. Regan*, an ERS employee challenged the termination of his employment under Section 1983 and sought, inter alia, reinstatement. 777 F.2d at 827-28. We held that "[r]einstatement is purely prospective injunctive relief that orders the state official to return the former employee to the state's payroll," *id.* at 836, and that "an order that reinstatement be granted or that a reinstatement hearing be conducted is the sort of prospective relief that is not barred by the Eleventh Amendment," *id.* (citing *Edelman*, 415 U.S. at 664).

Defendants argue that reinstatement to employment is somehow to be distinguished from the injunction sought by Russell because the relief Russell seeks would be "the mechanism which would enable plaintiff to seek to have

the Comptroller's determination changed and to have disability retirement benefits paid to him." Brief for Appellees at 12. The possibility that the injunctive relief sought by Russell might result in payments from the state treasury, however, hardly distinguishes *Dwyer*. To the contrary, the reinstatement in *Dwyer* directly entitled the plaintiff to a salary and thus had a far more certain and immediate effect on the state treasury than would result from allowing Russell merely to apply for disability retirement. Furthermore, the reinstatement in *Dwyer*, like the relief sought in the instant case, contemplated "chang[ing] the result of an action . . . already taken." *Russell*, slip op. at 6. We do not agree with the district court that the existence of a past harm renders an otherwise forward-looking injunction retroactive. If it did, the rule allowing prospective relief would be substantially undermined because the need for prospective relief often arises out of a past injury. *See Milliken v. Bradley*, 433 U.S. 267 (1977). Under *Dwyer*, therefore, Russell's reinstatement to medical leave would be prospective relief and not barred by the Eleventh Amendment. *See* 777 F.2d at 836; *see also Barnes v. Bosley*, 828 F.2d 1253, 1257 (8th Cir. 1987); *Kashani v. Purdue Univ.*, 813 F.2d 843, 848 (7th Cir.), *cert. denied*, 108 S. Ct. 141 (1987).

2. *Russell's Due Process Claim*

Because both parties have fully briefed the due process issue and it can be disposed of as a matter of law, we see no reason to remand. We now turn to that issue.

RSSL Section 605(b)(2) put Russell on notice that if he sought disability retirement, he would have to apply either within three months of his last date on the payroll

or within one year of his payroll termination and while he was still on medical leave of absence. Under CSL Section 71, *see supra* note 1, he was guaranteed such leave for a period of one year from his injury, or until September 21, 1984. Thereafter, such leave appears to have been at the discretion of the employing agency, here the Harlem Valley facility. Russell's claim, therefore, is that because the discretionary termination of his medical leave on December 18, 1984 also terminated the application period for disability retirement, he was entitled to pre-termination notice sufficient to permit him to apply for disability retirement.

The entitlement to disability retirement is a constitutionally protected property interest for purposes of Section 1983. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). We have previously held that municipal employee retirement benefits are constitutionally protected property, *see Winston v. City of New York*, 759 F.2d 242, 247-49 (2d Cir. 1985); *Basciano v. Herkimer*, 605 F.2d 605, 607 (2d Cir. 1978), *cert. denied*, 442 U.S. 929 (1979), and the New York State Constitution itself provides: "membership in any pension or retirement system of the state . . . shall be a contractual relationship, the benefits of which shall not be diminished or impaired," N.Y. Const. art. V, § 7. This is all that *Roth* requires. *See* 408 U.S. at 577 (property interest requires "legitimate claim of entitlement").

We also reject defendants' argument that Article 78 of the New York Civil Practice Law & Rules, N.Y. Civ. Prac. L. & R. §§ 7801-7806 (McKinney 1981 & Supp. 1990) ("Article 78"), provides an adequate post-deprivation state remedy. *Cf. Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds*,

Daniels v. Williams, 474 U.S. 327 (1986); *Hudson v. Palmer*, 468 U.S. 517 (1984). Article 78 does provide a means of reviewing the merits of the Comptroller's determination as to eligibility. *See* N.Y. Retire. & Soc. Sec. Law § 74(d) (McKinney 1987) (providing for Article 78 review). Russell, however, is not challenging the Comptroller's finding of untimeliness, but rather the failure to give him pre-termination notice sufficient to allow him time to apply for disability retirement. The defendants rely heavily on our decision in *Campo v. New York City Employees' Retirement System*, 843 F.2d 96 (2d Cir.), *cert. denied*, 109 S. Ct. 220 (1988), as holding that Article 78 is a sufficient remedy in such circumstances. *Campo*, however, held only that a retirement claimant was not denied constitutional due process where her claim of random procedural error could have been redressed by a state court in an Article 78 proceeding. Russell does not claim that he was deprived of the right to apply for benefits by random procedural error. Rather, he concedes his application was untimely under RSSL Section 605 and challenges the fact that pre-termination notice of the discretionary discontinuance of medical leave is not provided by state law. That challenge, if meritorious, can be entertained under Section 1983.

Nevertheless, we reject Russell's due process claim because New York has a valid reason for not giving such notice. CSL Section 71 expressly states that an injured employee has a right to one year of medical leave (and by implication a discretionary period thereafter) "unless his disability is of such a nature as to permanently incapacitate him." *See supra* note 1. If Russell believed himself to be permanently disabled, therefore, state law obliged him to seek disability retirement, even

though a favorable ruling on that application would terminate his leave of absence and reinstatement rights. Where a state employee like Russell chooses to continue to exercise rights under CSL Section 71 rather than to seek disability retirement, New York treats that decision as a statement that the employee does not consider himself or herself permanently disabled and needs no pretermination notice concerning medical leave.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court established three factors to be considered in evaluating an administrative procedure under the due process clause:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. As to the first of these factors, the private interest at issue here is concededly great—Russell claims an entitlement to some $200,000 over the years he would be covered. The second *Mathews* factor, however, is minimal. There is simply very little risk in the statutory scheme of erroneous disentitlement—at least in Russell's circumstances—because the state has made it clear that employees who believe they are disabled should apply for disability retirement under RSSL Section 605 rather than continue on CSL Section 71 medical leave with reinstatement rights. Russell makes no claim that he discovered the permanent status of his disability so close to

learning of the December 18 termination that he had no time to apply. Rather, he claims a constitutional right to maintain his medical leave under CSL Section 71 as long as possible and then an additional period of time within which to make a claim of permanent disability.

Continuing the *Mathews* analysis, we believe New York has an interest in discouraging employees who are on medical leave from prolonging that status to claim permanent disability only when the employing agency terminates the medical leave. Benefits differ between disabled workers who might return and those who will not, and orderly hiring of new employees is enhanced by accurate information as to which employees are permanently disabled. We therefore believe that New York may require employees who suspect they are permanently disabled to apply for disability retirement when that suspicion arises and to view continued enjoyment of medical leave under CSL Section 71 without an application under RSSL Section 605 as a statement by the employee that he or she is not permanently disabled. Such an employee needs no notice regarding termination of the time period for applying for disability retirement. An employee suspecting permanent disability can apply for disability retirement, and, if rejected on the merits, can continue to enjoy CSL Section 71 rights. Russell thus had ample notice and time to apply if he believed himself permanently disabled.

Affirmed.

LUMBARD, *Circuit Judge*, dissenting:

I disagree with the majority's conclusion that Russell was not entitled to pretermination notice. Russell was apparently entitled on the merits to the disability retirement benefits and thus had as much of a property interest in the opportunity to apply for those benefits as he had in the benefits themselves. Because terminating his medical leave was the equivalent of terminating his final opportunity to apply, I believe he should have received advance notice.

RSSL Section 605 grants state employees *on medical leave* the right to claim permanent disability benefits:

> The application must be filed within three months from the last date the member was being paid on the payroll or within twelve months of the last date he was being paid on the payroll *provided he was on a leave of absence for medical reasons without pay during such twelve month period* provided the member was disabled at the time he ceased being paid.

RSSL § 605 (emphasis added). Given the emphasized language, I do not understand how the majority can conclude that New York treats a state employee's decision to remain on medical leave "as a statement that the employee does not consider himself or herself permanently disabled." The majority apparently believes that, by taking medical leave, Russell waived any claim to disability retirement benefits he had or might later make and that therefore Russell had no protected interest of which he may not be deprived without advance notice. But I think it beyond dispute that the State considers an employee's decision to remain on medical leave a state-

ment that the employee, with the full blessing of the State, needs more time in which to decide whether to consider himself or herself permanently disabled.

Although the majority appears to consider medical leave status a sort of "temporary disabled list" for employees who know from the outset that they are not permanently disabled, it is obvious that many employees simply cannot know immediately after injury whether their disability will become permanent. The vagaries of healing and diagnosis make it almost impossible for doctors, not to mention injured state employees such as Russell, to predict the permanence of a disability without a reasonable lapse of time in which to gauge the body's healing or disability. Clearly, RSSL Section 605 contemplates that state employees, at some point *during* medical leave, might choose to consider themselves permanently disabled. By taking medical leave, Russell *preserved* his right to claim disability retirement benefits and therefore was entitled to pretermination notice.

I also disagree with the majority's analysis of the second *Mathews* factor, which concerns the risk of erroneous deprivation and the value of additional procedural safeguards. The absence of pretermination notice in cases such as this creates an unacceptably high risk of erroneous disentitlement for qualified employees. For example, when in September 1984 Russell asked responsible officials of the New York State Division for Youth about his retirement rights, he was informed—erroneously—that he needed ten years of service to apply for disability retirement benefits.[1] Had Russell

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1 For the sake of argument, I accept the State's contention that, under New York law, this error cannot be grounds for an estoppel claim against the State.

received the appropriate notice, this error could have been remedied.

Even if Russell had never asked about his rights but had nonetheless received the letter terminating his medical leave, the resulting foreclosure of his opportunity to apply would still have been erroneous simply because Russell, in whose favor the court must resolve all doubts on the defendants' summary judgment motion, was apparently entitled on the merits to the benefits he seeks. If responsible state officials are misinformed about retirement rights, I do not see how Russell could have been expected to know his rights without receiving notice of the impending termination of his leave and the consequences thereof. The avoidable error was keeping Russell in the dark about so crucial a property interest as retirement benefits.

The majority argues that "Russell makes no claim that he discovered the permanent status of his disability so close to learning of the December 18 termination that he had no time to apply." The issue, however, is whether the State should have given Russell notice, *not* whether Russell would have applied, or would have had time to apply, but for the absence of notice. In any case, a letter to a state employee stating that valuable rights will be terminated unless that employee acts promptly will likely spur that employee to action.

I note also that this case involves the termination of an open-ended, discretionary medical leave. Although the State was under no obligation to grant Russell a discretionary leave beyond one year, once the State granted the leave without stating at the outset when or if it would end, the State could not terminate it—and the

associated opportunity to apply for benefits—without prior notice.

Finally, the majority's analysis of the third *Mathews* factor, concerning the Government's interest, shows insensitivity to the worker-protective statutory scheme. The majority claims that New York has an interest in discouraging employees from taking full advantage of medical leave status. Given that the statutes at issue grant certain employees medical leave and entitle them to apply for disability retirement benefits, I do not see how the majority divines a state "interest"—really, an off-the-books policy—of discouraging employees from availing themselves of statutory leave. In any event, the action of the State in giving no advance notice of termination surely went far beyond any reasonable "discouragement." There is nothing in the record to suggest that Russell had taken any improper advantage of his right to medical leave status.

The irony of this case is that Russell did receive post-termination notice, which obviously did him no service whatsoever. It would have put no conceivably greater burden on the responsible state officials to have sent notice before termination, rather than after.

I would reverse and remand with instructions to restore Russell to medical leave and to consider his application for disability retirement benefits on the merits.

APPENDIX B

B-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

87 Civ. 7749 (TPG)

TIMOTHY E. RUSSELL,

Plaintiff,

—against—

LEONARD G. DUNSTON, INDIVIDUALLY AND AS DIRECTOR OF THE NEW YORK STATE DIVISION FOR YOUTH; ROBERT A. WILEY, INDIVIDUALLY AND AS DIRECTOR OF HARLEM VALLEY SECURE CENTER; AND EDWARD V. REGAN, INDIVIDUALLY AND AS COMPTROLLER OF THE NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM,

Defendants.

Opinion

Plaintiff Timothy Russell, a former employee of the New York State Division for Youth (DFY), brings this action against Leonard Dunston, the Director of DFY, Edward Regan, Comptroller of the New York State Employees' Retirement System, and Robert Wiley, Director of the Harlem Valley Secure Center. Plaintiff's claim, pursuant to 42 U.S.C. §1983, is that defendants deprived him of property without due process of law by terminating his employment without advance notice, thereby preventing him from timely applying for disability retirement benefits.

The complaint seeks declaratory and injunctive relief, including a declaration that the statutory scheme is unconstitutional; reinstatement to his pre-termination employment status; and an order directing defendants to determine his benefits application on the merits.

The parties have crossed moved for summary judgment. Defendants' motion for summary judgment is granted, because the Eleventh Amendment bars plaintiff's suit. Plaintiff's motion is denied.

FACTS

On September 8, 1981, plaintiff was appointed to a permanent position by the New York State DFY at Harlem Valley Secure Center. He first worked as a Youth Division Aide and later as a vocational instructor.

Plaintiff became a member of the New York State Employees' Retirement System ("ERS"), as he was required to do, in 1982. As a member, 3% of his salary was automatically deducted from his paycheck and transmitted to the ERS.

On September 21, 1983, plaintiff was injured at work when he tried to break up a fight between residents of the facility. He was immediately placed on a medical leave of absence.

Plaintiff was on workmens' compensation leave until March 21, 1984. He then went on sick leave at half pay until June 27, 1984, at which time he was placed on sick leave without pay.

By certified letter dated December 18, 1984, plaintiff was notified by defendant Wiley, director of the facility where plaintiff had worked, that his leave of absence had expired and his employment was terminated effective December 18.

On March 14, 1985, plaintiff filed an application for disability retirement benefits under *RSSL* §605. Plaintiff sought a yearly retirement allowance of $6,453. On June 14, 1985 defendant Regan (the Comptroller) denied the application as untimely under the governing regulations. Those regulations require that an application be made either (a) within three months of the date plaintiff was last on the payroll or (b) within twelve months of the date plaintiff was last on the payroll if plaintiff was still on a medical leave of absence at the time of filing. *RSSL* §605(b)(2).

Plaintiff sought and received a hearing for redetermination of the application on May 19, 1986. On October 31, 1986, the hearing officer upheld the Comptroller's finding of untimeliness.

The Present Motions

The cross-motions for summary judgment raise a number of

issues. Only one needs to be discussed and that is the Eleventh Amendment defense.

DISCUSSION

The defendants contend that plaintiff's action is barred by the immunity granted to the States in the Eleventh Amendment. Defendants argue that the action is essentially against the State of New York, since it is a suit against New York state officials in their "official capacity." This is because defendants are being sued for following state policy as enacted by the New York legislature. Defendants further maintain that plaintiff is primarily seeking monetary and retroactive relief, which is precluded by the Eleventh Amendment.

Plaintiff denies that the Eleventh Amendment is applicable to this action. Plaintiff contends that under *Ex Parte Young*, 209 U.S. 123 (1908), a challenge to the constitutionality of a state official's actions is not considered an action against the state. Plaintiff argues that here the defendants violated the Fourteenth Amendment guarantee of Due Process and therefore are stripped of their official character and Eleventh Amendment immunity. Plaintiff further claims to be seeking primarily prospective declaratory and injunctive relief, which is permissible under the Eleventh Amendment.

The Eleventh Amendment bars suits against a state in federal court unless the state has consented or Congress enacts particular legislation which overrides that immunity. Actions nominally against a state officer are also barred where the decree would operate against the state, or where the state is the real, substantial party in interest. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984).

> "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. And, as when the State itself is named as the defendant, a suit against state officials is barred regardless of whether it seeks damages or injunctive relief."

Id., at 101-102.

The exception to this general rule is that when a plaintiff sues a state official alleging a violation of federal law, the federal court may grant an injunction controlling the official's future conduct, but not one that provides retroactive relief. *Edelman v. Jordan*, 415 U.S. 651, (1974); *Pennhurst*, 465 U.S. at 102. Therefore, a suit which would essentially impose a liability to be paid by public funds of a state is barred, while a federal court "may enjoin state officials to conform their future conduct" to federal law. *Quern v. Jordan*, 440 U.S. 332, 337 (1979). However, the Eleventh Amendment does not bar the expenditure of State funds if it is ancillary to the prospective relief requested.

Plaintiff relies on *Quern*, where the Court upheld a court order directing state officials to send a "mere explanatory notice" to welfare applicants. The notice informed the applicants that there was a state administrative procedure available to determine if in fact they were entitled to welfare benefits which they had been denied. This was held to be consistent with the Eleventh Amendment since it amounted to prospective relief. That was in part because the sending of the notice "does not trigger the state administrative machinery," and the decision to grant benefits still "rests entirely with the State." 440 U.S. at 348.

By contrast, the order sought by plaintiff in this case to direct defendants to reinstate him to his status prior to his discharge would constitute retroactive relief. Plaintiff does not seek to have defendants treat applications differently in the future, but rather to go back and change the result of an action they have already taken. The order sought directing defendants to determine his benefits application on the merits certainly will "trigger the state administrative machinery," and will go a long way towards creating a liability of the state which does not now exist. This stands in stark contrast to a prospective injunction, one that would require a different notification scheme for future employees.

Plaintiff's suit here is inherently one against the State of New York, since plaintiff's problem is with State law and policy.

which the defendants merely carried out in their official capacity. In seeking to alter a past determination under this policy rather than change the policy for the future, plaintiff is seeking retroactive relief against New York State, and this is barred by the Eleventh Amendment.

CONCLUSION

The action is dismissed.
SO ORDERED.
Dated: New York, New York
June 26, 1989

THOMAS P. GRIESA
U.S.D.J.

APPENDIX C

42 USC §1988

§1988. Proceedings in vindication of civil rights; attorneys fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX D

§50. Examinations generally.

1. Positions subject to competitive examinations. The merit and fitness of applicants for positions which are classified in the competitive class shall be ascertained by such examinations as may be prescribed by the state civil service department or the municipal commission having jurisdiction.

2. Announcement of examination. The state civil service department and municipal commissions shall issue an announcement of each competitive examination, setting forth the minimum qualifications required, the subjects of the examination, and such other information as they may deem necessary, and shall advertise such examination in such manner as the nature of the examination may require. Such announcement and advertisement shall each inform prospective applicants of the options for religious observance provided in subdivision eight of this section.

3. Application for examination. The civil service department and municipal commissions shall require prospective applicants to file, during a prescribed time, a formal application in which the applicant shall state such information as may reasonably be required touching upon his background, experience and qualifications for the position sought, and his merit and fitness for the public service. The application shall be subscribed by the applicant and shall contain an affirmation by him that the statements therein are true under the penalties of perjury. Blank forms for such application shall be furnished by said department and such municipal commissions without charge to all persons requesting the same. The department and such municipal commissions may require in connection with such application such certificates of citizens, physicians, public officers or others having knowledge of the applicant, as the good of the service may require.

4. Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible

(a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies; or

(b) who is found to have a physical or mental disability which renders him unfit for the performance of the duties of the position in which he seeks employment, or which may reasonably be expected to render him unfit to continue to perform the duties of such position; or

[(c) Repealed]

(d) who has been guilty of a crime; or

(e) who has been dismissed from a permanent position in the public service upon stated written charges of incompetency or misconduct, after an opportunity to answer such charges in writing, or who has resigned from, or whose service has otherwise been terminated in, a permanent or temporary position in the public service, where it is found after appropriate investigation or inquiry that such resignation or termination resulted from his incompetency or misconduct, provided, that in cases of dismissal, resignation or termination after written charges of incompetency, the examination or certification in question be for a position that requires the performance of a duty or duties which are the same as or similar to the duty or duties of the position from which the applicant has been dismissed, resigned or terminated on account of incompetency; or

(f) who has intentionally made a false statement of any material fact in his application; or

(g) who has practiced, or attempted to practice, any deception or fraud in his application, in his examination, or in securing his eligibility or appointment; or

(h) who has been dismissed from private employments because of habitually poor performance.

No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons there-

for and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

Notwithstanding the provisions of this subdivision or any other law, the state civil service department or appropriate municipal commission may investigate the qualifications and background of an eligible after he has been appointed from the list, and upon finding facts which if known prior to appointment, would have warranted his disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in his application, examination or appointment, may revoke such eligible's certification and appointment and direct that his employment be terminated, provided, however, that no such certification shall be revoked or appointment terminated more than three years after it is made, except in the case of fraud.

5. Application fees. (a) Every applicant for examination for a position in the competitive or non-competitive class, or in the labor class when examination for appointment is required, shall pay a fee to the civil service department or appropriate municipal commission at a time determined by it. Such fees shall be dependent on the minimum annual salary announced for the position, as follows: (1) on salaries of less than three thousand dollars per annum, a fee of two dollars; (2) on salaries of more than three thousand dollars and not more than four thousand dollars per annum, a fee of three dollars; (3) on salaries of more than four thousand dollars and not more than five thousand dollars per annum, a fee of four dollars; and (4) on salaries of more than five thousand dollars per annum, a fee of five dollars. If the compensation of a position is fixed on any basis other than an annual salary rate, the applicant shall pay a fee based on the annual compensation which would otherwise be payable in such position if the services were required on a full time annual basis for the number of hours per day and days per week established by law or administrative rule or order. Fees paid hereunder by an applicant whose application is not approved may be refunded in the discretion of the state civil service department or of the appropriate municipal commission.

(b) Nothwithstanding the provisions of paragraph (a) of this subdivision, the state civil service department, subject to the approval of the director of the budget, a municipal commission, subject to the approval of the governing board or body of the city or county, as the case may be, or a regional commission or personnel officer, pursuant to governmental agreement, may elect to waive application fees, or to abolish fees for specific classes of positions or types of examinations classes of positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees different from those prescribed in paragraph (a) of this subdivision, specifying in such schedule the classes of positions or types of examinations or candidates to which such fees shall apply; provided, however, that fees shall be waived for candidates who certify to the state civil service department that they are unemployed and primarily responsible for the support of a household.

(c) All fees collected hereunder by the state civil service department, except as hereinafter provided, shall be paid into the state treasury in the manner prescribed by the state finance law. Fees collected from applicants for examinations given exclusively for positions in the division of employment in the department of labor shall be held in trust until such time as the costs of such examinations have been ascertained and thereupon shall be disbursed as follows: (1) to the extent that such fees are sufficient therefor, there shall be paid into the unemployment administration fund maintained under the unemployment insurance law, an amount equal to the costs of such examinations. Such payments shall be made on the fifth day of the month following the month in which such costs were ascertained and shall be accompanied by a detailed, verified statement and a duplicate of such statement shall be filed on the same day with the state comptroller; (2) the balance, if any, of such fees shall be paid into the state treasury pursuant to the state finance law.

(d) All fees collected hereunder by any municipal civil service commission shall be paid into the general fund of the municipality for which such commission has been appointed.

6. Scope of examinations. Examinations shall be practical in their character and shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of that service into which they seek to be appointed. The state civil service department or appropriate municipal commission, as the case may be, may establish an eligible list on the basis of ratings received by the candidates in the competitive portions of the examination and thereafter conduct medical, physical and other appropriate non-competitive qualifying tests from time to time as the need for certifications from the eligible list may require.

7. Court review of examination questions and answers. Where the state civil service commission or appropriate municipal civil service commission has, following its duly established review procedures, which in the case of the city of New York are set forth in section fifty-a of this chapter, made a final determination as to the answers that are acceptable on a particular examination, such determination shall not be subject to further review in any court. Court review shall be limited to be a determination of whether such duly established review procedures were followed, and the court shall have no authority to determine whether the commission's determination was correct.

8. Limitation of eligibility to one sex. The state civil service department or the municipal commission having jurisdiction may limit eligibility for examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex, or visitation, inspection or work of any kind the nature of which requires sex selection.

9. Examination of candidates unable to attend tests because o[f] religious observance. A person who, because of his religious beliefs, is unable to attend and take an examination scheduled to be held by the state department of civil service or a municipal commission on a Saturday or on a day which is a religious holiday observed by him, shall be permitted to take such examination on some other day designated by the state department of civil service or appropriate municipal commission, at

a reasonably comparable time and place without any additional fee or penalty.

10. The term "physical or mental disability" as used in this section, means a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques. Determination of physical or mental disability shall be made by a medical officer employed or selected by the civil service department or the municipal commission having jurisdiction.

(As amended L.1985, c. 845, §1; L.1986, c. 783, §1; L.1986, c.783, §1; L.1988, c. 611, §1; L.1989, c.61, §195.)

APPENDIX E

CSL §71. Reinstatement after separation for disability.

Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law,[1] he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position. Such employee may, within one year after termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filling of such vacancy, the name of such person shall be placed upon a preferred list for his former position, and he shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his former position, his name shall be placed on the preferred eligible list for his former position or any similar position. This section shall not be deemed to modify or supersede any other provisions of law applicable to the reemployment of persons retired from the public service on account of disability.

L.1958, c. 790, §1.

[1] Renamed Workers' Compensation Law.

APPENDIX F

RSSL §500. Application.

a. Notwithstanding any other provision of law, except as otherwise provided in subdivisions c and f of this section, the provisions of this article shall apply to all members who join or rejoin a public retirement system of the state on or after July first, nineteen hundred seventy-six and to all employees who would have been eligible to join or rejoin such a retirement system on or after such date but in lieu thereof elected an optional retirement program to which their employers are thereby required to contribute. In the event that there is a conflict between the provisions of this article and the provisions of any other law or code, the provisions of this article shall govern.

b. Notwithstanding any other provision of this article to the contrary, persons who on or after July first, nineteen hundred seventy-six:

1. Enter the employment of a public employer which participates for such employees in the New York city employees' retirement system, the New York city teachers' retirement system, the New York city police pension fund, article two, the New York city fire department pension fund, article one-B, and the New York city board of education retirement system shall be required to become members or shall be eligible or ineligible for membership in such retirement system or pension fund in the manner provided for by the relevant provisions of the New York city administrative code and other relevant laws and rules and regulations.

2. Enter the employment of a public employer which participates for such employees in the New York state teachers' retirement system shall be required to become members or shall be eligible or ineligible for membership in such retirement system in the manner provided for by the relevant provisions of the New York state education law.

3. Enter the employment of a public employer which participates for such employees in the New York state policemen's and firemen's retirement system shall be required to become mem-

bers or shall be eligible or ineligible for membership in such retirement system in the manner provided for by the relevant provisions of this chapter.

4. Enter the employment of a public employer which participates for such employees in the New York state employees' retirement system in positions in which they shall work full time shall be required to become members.

a. Provided, however, persons in the employ of such employers after such date in positions in which they work less than full time shall be permitted to become members of the New York state employees' retirement system by filing an application therefor in the manner provided for by section forty of this chapter.

b. Provided further that an employee of a county extension service association or Cornell university appointed for the first time on or after August first, nineteen hundred seventy-seven who holds a federal cooperative appointment with the United States department of agriculture as designated by the director of the New York state cooperative extension service and who is eligible for participation in the federal retirement system shall be excluded from membership in the state employees' retirement system.

c. Provided further that any employee of a county extension service association and any employee of Cornell university appointed for the first time on or after July first, nineteen hundred seventy-six but on or before July thirty-first, nineteen hundred seventy-seven, who holds a state cooperative appointment as designated by the director of the New York state cooperative extension service may elect to receive a federal cooperative appointment in the manner provided for by the relevant federal laws, rules and regulations and to participate in the federal retirement system and discontinue his participation in the state retirement system by filing a written notice of termination on or before December thirty-first, nineteen hundred seventy-eight with the comptroller. Any employee who is a member of the state employees' retirement system at the time he or she elects coverage

in the federal retirement program shall be deemed to be a person who discontinues service on the effective date of such election, for the purpose of determining his or her eligibility for rights and benefits in such state system; provided, however, that if he or she does not withdraw accumulated contributions, (1) continued service with the county extension service association or Cornell university while under the federal retirement program shall be deemed to be member service in the New York state employees' retirement system for the purpose of determining eligibility for any vested retirement allowance, retirement allowance or ordinary death benefit under such system dependent upon a specified period of total service or upon attainment of a specified age while in service or upon death while in service; and (ii) the amount of any such benefit to which the person or his or her estate or person designated by him or her may become entitled under either system shall be computed only on the basis of service otherwise creditable to him or her therein and his or her compensation during such service. Electing employees and their beneficiaries shall not be entitled to any right or benefit under the New York state employees' retirement system other than a vested retirement allowance, retirement allowance or ordinary death benefit to the extent expressly provided for in this chapter.

c. If the comptroller certifies that the contribution rate under this article for any participating employer who is participating on the effective date hereof would be at least one percent higher than the rate which would be applicable to such employer for an employee who is subject to article eleven of this chapter and who was hired prior to July first, nineteen hundred seventy-six, the provision of this article shall not apply with respect to such participating employer. In such event, the provisions of article eleven shall continue to be applicable to such participating employer and its employees, as provided in section four hundred fifty-one of this chapter. If, as a result of actuarial experience, such employer's contribution rate should increase to the extent that it is not at least one percent lower than the contribution rate under this article, then, upon certification of such fact by the

comptroller, the provisions of this subdivision shall no longer apply with respect to the employees of such employer who thereafter first join or rejoin a public retirement system.

d. The provisions of this article shall not be construed to extend coverage to an employee who would not have been, if employed in the same capacity on June thirtieth, nineteen hundred seventy-six, eligible for membership in the retirement system involved, or to provide an increase in benefits to a member of a retirement system other than as provided by sections five hundred six, five hundred seven, five hundred eight and five hundred nine of this article.

e. Notwithstanding any other provision of law, any person who is not required to become a member of a public retirement system of the state by subdivision b of this section but who became a member on or after July first, nineteen hundred seventy-six may terminate such membership by filing a written notice of termination with the head of the retirement system of which he is a member on or before July first, nineteen hundred seventy-seven.

f. Notwithstanding the provisions of subdivision a of this section, members who were employed by the New York city board of education and assigned during the first fifteen days of the school term to a position which is expected to be vacant for that term and who were employed in one of the three school years immediately prior to July first, nineteen hundred seventy-six in a position which did not entitle them to apply for membership in a public retirement system who first joined the New York city teachers' retirement system subsequent to June thirtieth, nineteen hundred seventy-six shall have all the rights, benefits and privileges applicable to employees who were members of such system on June thirtieth, nineteen hundred seventy-six provided they make written application, duly executed and filed with the New York city teachers' retirement board prior to July first, nineteen hundred eighty-nine.

(As amended L.1988, c. 522, §§1,2.)

APPENDIX G

RSSL §517. Member contributions.

a. Members shall contribute three percent of annual wages to the retirement system in which they have membership, provided that such contributions shall not be required for more than thirty years, for general members, or twenty-five years, for police/fire members. The head of each retirement system shall promulgate such regulations as may be necessary and appropriate with respect to the deduction of such contribution for members' wages and for the maintenance of any special fund or funds with respect to amounts so contributed.

b. In the event of termination of employment, other than as a result of transfer to another public employer, a member who is not vested or entitled to any other benefit under this article may withdraw his accumulated contributions pursuant to regulations promulgated by the head of the retirement system involved. In the event membership in a public retirement system shall terminate, other than as a result of transfer to another public employer, any contributions remaining to the credit of the member shall be refunded as specified by the rules or regulations of the system involved. For the purpose of such withdrawal or refund, such contributions, commencing on the date of this act or the date such member first makes contributions hereunder, whichever is later, together with the balances on such date from any contributions theretofore made, shall be credited with interest at the rate of five percent per annum.

c. Upon withdrawal of contributions by a member pursuant to subdivision b, membership in the public retirement system involved shall cease. A former member who thereafter returns to public service shall not receive any credit for previous service to which such withdrawn or refunded contributions applied unless such member applies therefor and repays the amounts so withdrawn or refunded, together with interest through the date of repayment at the rate of five percent per annum.

d. Notwithstanding any other provision of this article, a member shall be entitled to withdraw any excess contributions within

thin six months of becoming subject to this article. Thereafter, such contributions, and interest thereon, may only be withdrawn upon separation from service. Upon retirement such excess contributions, and any interest thereon, may be withdrawn in a single lump sum, or at the election of the member may be paid as an annuity under an option authorized pursuant to section five hundred fourteen of this article.

e. Notwithstanding any other provision of law, a member shall not be permitted to borrow any portion of the contributions which are subject to this section.

f. 1. Notwithstanding any other provision of law, each participating employer shall pick up the member contributions required on and after the effective date of this subdivision to be made under this section by its employees and shall do so by reducing the salary of each of its employees to which this section is applicable by that amount which each such employee is required to contribute under this section. The contributions so picked up shall be paid by each participating employer in lieu of the member contributions to be paid by its employees under this section and shall be treated as employer contributions in determining income tax treatment under section 414(h) of the Internal Revenue Code.

2. Any employee (subject to this article) of a participating employer who, in lieu of joining a public retirement system of the state, elected an optional retirement program to which their employers are thereby required to contribute shall, in order for the provisions of this subdivision to apply, be required to execute a salary reduction agreement (in accordance with the regulations promulgated under section 403 (b) of the Internal Revenue Code) in an amount equal to the employee contributions thereto which would otherwise be mandatory under the provisions of state law.

3. With the exception of federal income tax treatment, the employee contributions picked up or paid pursuant to this subdivision shall for all other purposes, including computation of

ployees, be deemed employee salary. Nothing contained in this subdivision shall be construed as superseding the provisions of section four hundred thirty-one of this chapter or any similar provision of law which limits the salary base for computing retirement benefits payable by a public retirement system.

4. The provisions of this subdivision f shall not apply to a police/fire member or a member of the New York city employees' retirement system who is a member of the uniformed correction force or of the uniformed force of the department of sanitation, as defined in subdivisions thirty-nine and sixty-two of section 13-101 of the administrative code of the city of New York.

(As amended L.1988, c.782, §1; L.1988, c. 783, §1.)

APPENDIX H

605. Disability retirement.

a. Application for a disability retirement allowance for a member may be made by:

1. Such member, or

2. The head of the department in which such member is employed

b. At the time of the filing of an application pursuant to this section, the member must:

1. Have at least ten years of total service credit, and

2. The application must be filed within three months from the last date the member was being paid on the payroll or within twelve months of the last date he was being paid on the payroll provided he was on a leave of absence for medical reasons without pay during such twelve month period provided the member was disabled at the time he ceased being paid.

3. Provided, however if the retirement system determines that such member was physically or mentally incapacitated for performance of gainful employment as the natural and proximate result of an accident not caused by his own willful negligence sustained in the performance of his duties in active service while actually a member of the retirement system the requirement that the member should have ten years of credited service shall be inapplicable.

c. If the retirement system determines that the member is physically or mentally incapacitated for the performance of gainful employment, and that he was so incapacitated at the time he ceased his performance of duties and [illegible]ht to be retired for disability, he shall be so retired. Each [illegible]irement system shall be entitled to adopt appropriate procedures for making the foregoing determination, including but not limited to the conducting of medical examinations, if any, for the purpose of determining initial entitlement of an applicant for disability retirement or to continued entitlement to a disability retirement allowance. Such

retirement shall be effective as of a date approved by the head of the retirement system.

d. Upon retirement for disability one of the following retirement allowances shall be payable:

1. If the member has attained age sixty when such retirement becomes effective, his retirement allowance shall be equal to that which he would receive in the case of service retirement at normal retirement age based on his credited service but in no event shall such retirement allowance exceed the amount he would receive pursuant to paragraph two of this subdivision.

2. If the member has not attained age sixty when such retirement becomes effective, his retirement allowance shall consist of a retirement allowance which shall equal one-sixtieth of his final average salary multiplied by the number of years of his credited service, which formula shall be used only if the retirement allowance so computed exceeds one-third of his final average salary. If the retirement allowance so computed shall amount to one-third or less of the member's final average salary, his retirement allowance shall be computed upon the basis of the total service which he would have rendered if he continued in service until he attained age sixty provided that the resulting retirement allowance computed by resort to this formula shall not exceed one-third of the member's final average salary.

(Added L.1983, c. 414, §1.)

1989 Amendment

b. At the time of the filing of an application pursuant to this section, the member must:

1. Have at least ten years of total service credit, and

2. The application must be filed within three months from the last date the member was being paid on the payroll or, in the case of a member who was placed on a leave of absence for medical reasons without pay, either voluntarily or involuntarily, at the time he ceased being paid, application may be made not later

than twelve months after the date the employee receives notice that his employment status has been terminated.

(As amended L.1989, c. 226, §1)

FILED
JUL 13 1990
JOSEPH F. SPANIOL
CLERK

No. 89-1786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TIMOTHY E. RUSSELL,

Petitioner,

vs.

LEONARD G. DUNSTON, Individually and as Director of the New York State Division for Youth; ROBERT A. WILEY, Individually and as Director of Harlem Valley Secure Center; and EDWARD V. REGAN, Individually and as Comptroller of the New York State Employees' Retirement System,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

Petitioner, a former probationary employee with the New York State Division For Youth, was terminated from employment in accordance with N.Y. Civil Service Law ("CSL") § 71 (McKinney 1987) while on unpaid medical leave status. He seeks review of an opinion and judgment of the United States Court of Appeals for the Second Circuit which held that respondents' rejection of his untimely application for disability retirement benefits did not violate his rights under the due process clause of the fourteenth amendment. The petition for certiorari should be denied.

As petitioner acknowledges, he "fell into a rare situation." (p. 18)* He makes no showing that a ruling by this Court would have any impact on any other state's statutory scheme, much less that the courts of appeals are divided on the issue presented. Moreover, "[t]he gap into which petitioner fell" has been closed in New York due to the amendment to Retirement and Social Security Law § 605(b)(2) and 4 N.Y.C.R.R. §§ 5.9, 21.8 (p. 18 n.3) in 1989. These amendments enacted subsequent to Mr. Russell's termination require that occupationally injured civil servants be given thirty days' notice of the termination of their medical leave. Therefore, it is a virtual certainty that Mr. Russell's "rare" and "unusual" situation will never occur again.

Furthermore, as the Court of Appeals held, the State was under no constitutional obligation to provide petitioner with pre-termination notice. As the court concluded, Russell had ample time and notice to apply for benefits if he believed himself permanently disabled. (A-13) The court's holding flowed from its straightforward application of this Court's well-established test adopted in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Therefore, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 16, 1990

Respectfully submitted,

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* References preceded by "p." are to the petition for certiorari. The reference preceded by "A." is to the appendix to the petition.